Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ANTHONY ARMANDO RIOS,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOURTH APPELLATE DISTRICT DIVISION THREE

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

Whether Certiorari Should Be Granted to Establish That Exclusion of Some Members of the Public Who Are Supporters and Family Members of the Accused Violates the Sixth Amendment Right to a Public Trial Where There Is No Showing or Any Findings of the Necessity to Exclude Them in Order to Promote Some Higher Value.

2.

Whether Certiorari Should Be Granted Because California and Lower Federal Courts Have Erroneously Held That When a Closure of a Criminal Trial Is "Partial" or Excludes Only Part of the Public a Different Standard Applies to Determine Whether the Right to a Public Trial Has Been Violated

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1.

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Petitioner, ANTHONY ARMANDO RIOS, respectfully prays that a writ of certiorari issue to review the decision of Division Three of the Second District California Court of Appeal, affirming his criminal conviction.

OPINION BELOW

The opinion of the Court of Appeal, which was filed on August 4, 2009, as modified in an order filed on September 2, 2009, as well as the order of the California Supreme Court denying Mr. Rios' petition for discretionary review, are reproduced in the Appendix at pp. 1-45.

JURISDICTION

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. Section 1257, subdivision (a). The order of the Supreme Court denying discretionary review was entered on November 19, 2009. Under Rule 13.1 of the Rules of this Court, this Petition is timely filed.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions,

the accused shall enjoy the right to a speedy and public trial, ..."

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The federal question presented on this Petition were raised in the Los Angeles County Superior Court and on direct appeal to the California Court of Appeal and in Petitioner's petition for discretionary review in the California Supreme Court. The Court of Appeal addressed the issue extensively.

The opinion of the Court of Appeal sets out the evidentiary framework of the case, but overlooks some factual aspects of the case which are significant for an understanding of the arguments set forth here by Petitioner.

Petitioner was convicted of the murder of Jack Tseng, a drug dealer who was killed by a single shot from a .9 mm pistol. Essentially, the case turns on the credibility of Luis Gonzalez, who was interrogated by the police several times. He initially told the police that Ricky Martinez killed Tseng, and then said that a group or gang known as Brownsides was responsible. Eventually, he told the police, and later testified at trial, that Petitioner killed Tseng. His story was that he drove Petitioner to meet Tseng to buy cocaine but when they met outside of The Hat restaurant, Petitioner walked over to Tseng, talked to him briefly, and a shot rang out. According to Gonzalez, Petitioner returned to his car, and stated that he did not shoot, but only scared Tseng, but he then overheard

Petitioner talking to Larry Chairez (Larry), Petitioner's wife's nephew, on a cell phone, saying that he "popped" him and to erase his name from his phone book. Larry did not corroborate Gonzalez, however, the People's case was bolstered by circumstantial evidence, including: (1) claims by Gonzalez that Petitioner, Larry, and Petitioner's wife all threatened him unless he named Ricky Martinez as the killer; (2) evidence that cell phone calls were placed around the time Gonzalez claimed Petitioner called Larry and told him he had popped the victim; and (3) the testimony of Christopher Roa, a young marijuana dealer who identified Larry as the person who set up a buy of marijuana a few years earlier, but who robbed him of marijuana at gunpoint using a .9 mm pistol. Roa could not identify the person who drove Larry to the location of the robbery in a black Honda when shown photos of Petitioner by the police (during the investigation of the present case), but did identify a small tattoo on his neck as the same as one on the driver.

The defense vigorously disputed the testimony of Gonzalez and introduced evidence that Gonzalez had received immunity in return for his accusation of Petitioner and pointed out that he had initially identified Ricky Martinez as the killer, and blamed it on the Brownsides group, of which Petitioner was not a member. The defense also disputed that Petitioner was involved in any way in robbing Roa years earlier. Larry testified that he did not rob Roa. Petitioner's wife testified that she never threatened Gonzalez for implicating Petitioner, and Ricky Martinez testified for the prosecution that he did not kill Tseng.

A fair reading of the trial testimony suggests that the critical issues for the jury to decide, in order to

determine whether or not Petitioner was the killer, were: (1) whether or not Petitioner previously participated in the robbery of Roa; and (2) whether or not Petitioner or his wife, or Larry, threatened Gonzalez to persuade him not to inculpate Petitioner as the killer of Tseng.

In order to bolster their case, the People objected to any evidence that tended to show that anyone, including Gonzalez, had accused Ricky Martinez of the killing, and introduced evidence tending to show Petitioner's bad character, under the guise of evidence to impeach the defense witnesses.

When Petitioner's home was searched, police found an inoperable .9 mm pistol on his refrigerator, which was not used in the crime.

Petitioner moved to exclude Roa's testimony regarding the alleged prior robbery by Larry, and any evidence of the uninvolved gun from his home. Both were allowed into evidence.

Prior to jury selection, but after the trial began, a recorded statement by Gonzalez was the subject of a motion to exclude or redact. The People advised the trial judge that there had been threats against prosecution witnesses, and sought to exclude from the courtroom two female relatives and a friend of Petitioner who were in court to watch his trial. Over objection, the court excluded all three women for the entire day, and only allowed them to return the next morning.

On appeal to the state Court of Appeal and State Supreme Court, Petitioner contended the order excluding two of his female relatives and a female friend violated his constitutional right to a public trial

and was a structural error requiring automatic reversal of his convictions.

SUMMARY OF ARGUMENT

This Court should grant certiorari to address the specific standards by which criminal trial courts must, under the Sixth Amendment, approach and resolve motions to close the courtroom for a part of the proceedings, or as to a part of the public. The California Courts have strayed from the standards set forth in this Court's leading authority on the issue of exclusion of the public, *Waller v. Georgia*, 467 U.S. 39, 46, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) ("*Waller*"), as have many of the federal circuits. This Court has not addressed "partial closure" cases, and lower courts have read a wide degree of latitude and relaxation of the rules set down for total closure into dicta from this court's decision in *Waller*.

In this case three supporters of the Petitioner were present in court when the prosecutor moved to exclude them. Two of them were relatives of Petitioner and the third was a friend.

The prosecutor represented that members of the defendant's family had been alleged to have "made threats" and stated that there were two police reports which said "the wife and nephew made threats."[1] The

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[1] The prosecution made its motion to exclude "the defendant's family" orally, without any notice and without any admissible evidence. The prosecutor stated:

"Because of security and because there

(continued...)

defense pointed out that neither the wife nor the nephew was in the court that day.

Defense counsel stated:

> "I think that the family certainly has a right to be here. The members that are here certainly have not been alleged to make any threats. If any threats have been made, they're allegedly oral threats. Nobody's been harmed. * * * So for [the prosecutor] Mr. Kraut to ask that the grandmother and other members be excluded without any showing that they have been involved in anything, I think is really out of line and they do have the right to be here." RT 4:16-28.

At the court's request, the three ladies present were identified as Petitioner's grandmother, his sister, and a friend. The court said to the prosecutor, "these individuals have not been involved in any threats. What is the concern concerning these individuals?" RT 5:8-10.

The prosecutor then said, without citing any actual statute or case law, that "we already know that two members of his family have threatened witnesses. The wife and the nephew have threatened harm to

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[1](...continued)

> have been threats - - and I have police reports, if the court is interested in them, associated with the defendant's family, and the defendant's family is now in court. For the 402 portion I would ask that they be removed from the courtroom because much of the information on that tape – or there's quite a bit of information on that tape with phone numbers, addresses, what they're concerned about, who they're concerned about being harmed and I think this is a safety issue to them because threats have already been lodged." RT 3:24-4:6.

witnesses, have followed them, have driven by their houses very slowly. I don't fault the Rios family for wanting to be in court, but the code in the Penal Code Section and the case law says that if - - - if the Court feels that it's necessary, the court can close this." RT 5:16-24

After reading two "incident reports" which apparently did not mention Petitioner's wife, but did refer to "two individuals,"[2] the trial court stated it had reviewed "the incident reports" and then said: "I don't know anything about the ladies who are present here in court, but for the purposes of the court making an evaluation of the tape, just in abundance of caution, I am going to ask that you not be in the courtroom while the tape is being played. So I'll ask you to step out and that's over defense objection." RT 6:20-25.

All of this was reported in the first six pages of the transcript of the morning session on August 8, 2007. However, although the court's order purported to be limited to the playing of the tape of an interview of Luis Gonzalez, in fact the order was expanded to cover the entire day of trial proceedings on August 8, 2007, which were by no means limited to the playing or evaluation of that tape.[3]

In the afternoon, with the three "ladies" (i.e., the family members and a friend) excluded, the court considered: (1) immunity letters for some prosecution witnesses (RT 13); (2) a request that Petitioner be

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[2] RT 6:3-4.

[3] At the close of the morning session on August 8, 2007, the court stated to defense counsel: "You might want to tell the family members . . . probably most of the day will be on the tape, so if they want to come back tomorrow." RT 12:1-4.

uncuffed and an unsworn allegation from the courtroom bailiff that Petitioner was affiliated with some gang (RT 14-15); (3) an argument regarding the admissibility of "excited utterances" which did not contain any phone numbers or addresses (RT 18); and (4) a discussion of discovery and interviews and witness lists (RT 18). Indeed, although the tape(s) of the Gonzalez interview(s) were played, the court did not rule on them on August 8, 2007.

Petitioner contends: (1) there was no justification at all for excluding two family members of Petitioner and another member of the public from the August 8, 2007 proceedings; (2) the trial court failed to make any proper record for its order excluding a portion of the public from a portion of Petitioner's trial; (3) this case does not fit into a narrow group of exceptions to the right to a public trial which allow limited closure, for good cause, establishing a "higher value" will be served by closure, based on evidence and written findings, as required by the decisions of this Court; (4) reversal is required without any showing of actual prejudice because denial of the right to a public trial is a structural error; and (5) As lower courts relax the rules for evaluating the denial of a public trial, they use phrases such as "minimal" and "de minimus" as a surrogate for injecting a harmless error standard into the analysis, which controverts this Court's holdings that violation of the right to a public trial is a structural error, in part because it is impossible to reliably determine whether or not the exclusion of the public, and most significantly, supporters of the accused, has deprived the defense of important information or rights.

ARGUMENT

1.

Certiorari Should Be Granted to Establish That Partial Exclusion of Some Members of the Public Who Are Supporters and Family Members of the Accused Violates the Sixth Amendment Right to a Public Trial Where There Is No Showing or Any Findings of the Necessity to Exclude Them in Order to Promote Some Higher Value.

Certiorari should be granted because the California Court of Appeal upheld a conviction where the record shows Petitioner was deprived of the right to a public trial as guaranteed by the Sixth Amendment.

A criminal defendant has a right to a public trial under the Sixth Amendment of the United States Constitution, made applicable to the states under the Fourteenth Amendment. The First and Sixth Amendments of the United States Constitution protect the public's right to attend all proceedings of a trial conducted in the courtroom. (*Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 511 (1984) (*Press-Enterprise*); *Waller, supra*, 467 U.S. 39, 46 ["[T]here can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public"]; see also *Richmond Newspapers v. Virginia*, 448 U.S. 555, 580 (1980) (*Richmond Newspapers*).)

The right to a public trial is longstanding. "This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage." (*In re Oliver*, 333 U.S. 257, 266 (1948).) "By the time of the adoption of the Constitution, public trials were clearly associated with the protection of the defendant." (*Gannett Co. v. DePasquale*, 443 U.S. 368, 387 (1979) (footnote omitted.)

The several protections afforded by the right to a public trial have been explained in the following ways: "No right ranks higher than the right of the accused to a fair trial. But the primacy of the accused's right is difficult to separate from the right of everyone in the community to attend the voir dire which promotes fairness." (*Press-Enterprise, supra,* 464 U.S. at p. 508.) "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their function." (*In re Oliver, supra,* 333 U.S. at p. 257, fn. 25.) "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing. When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case: 'The educative effect of public attendance is a material advantage. Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy.' " (*Richmond Newspapers, supra,* 448 U.S. at p. 572.)

> "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Press-Enterprise Co. v. Superior Court of California, supra,* 464 U.S. at p. 510.

Although the right to a public trial is not absolute, it may only be abridged in certain circumstances not applicable here. *Richmond Newspapers, supra,* 448 U.S. at p. 581 and fn. 18. Also, in order to do so, important procedural requirements must be met. In this case, the trial court did not identify the reports it reviewed, and so it made no findings specific enough that a reviewing court can determine whether the closure order was properly entered. Moreover, after reviewing whatever the People showed the court during the hearing on the motion to exclude the three women, the trial court disclosed that no evidence had been produced having anything to do with any of the three people excluded. The Court stated:

> "I *don't know anything about the ladies who are present* here in court, but for the purposes of the court making an evaluation of the tape, *just in abundance of caution*, I am going to ask that you not be in the courtroom while the tape is being played. So *I'll ask you to step out* and that's over defense objection." RT 6:20-25. [Italics supplied.]

In other words, the trial court in this case excluded three women about whom the court knew nothing.

Petitioner believes that certiorari should be granted to determine the standards by which certain sub-sets of the public may be excluded[4] and to hold that by any standard supporters of the accused may not be excluded unless the trial court is given *some* information about the persons to be excluded.

Since here the trial court stated it did not "know anything about the ladies" ordered out, the exclusion is a constitutional violation, calling for reversal.

In the present case, no showing was made that the people excluded posed any threat to anyone, and they were not excluded based on any finding that they were involved in any way with the threats that the People *claimed* but had not proved had been made. Moreover, the trial court admitted as much just before excluding them, and failed to make any written findings, or any record at all as to what it reviewed prior to the order. Nor did the trial court engage in any balancing of competing interests. Rather, the court merely gave in to the People's request knowing that the persons being excluded were not even accused of doing anything wrong.

Finally, the order was purportedly solely for the playing of a tape recorded interview in which some phone numbers and addresses were spoken, which was itself not the narrowest possible remedy for the concerns voiced by the People, but in fact the court did not merely exclude them for playing one tape, but excluded them for the entire rest of the day.

The trial court's reason for the exclusion order, such as it was, in essence, was that the presence of

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[4] Here the three women excluded were, apparently, the *only* members of the public present.

Petitioner's grandmother and sister and a friend somehow posed some undescribed threat, which had not been the subject of any evidence, and which the defense disputed. However, the court was presented with no valid reason for the exclusion. No specific findings supported it. The court's order was not narrowly tailored to accomplish its stated goal.

Neither the court nor the prosecutor mentioned any statute that would purportedly trump the constitutional right to a public trial.

The trial court made no specific findings that exclusion was necessary. It specifically disavowed any claim it believed the three family members of the defendant it was excluding had been involved in any wrongdoing, when it stated:
"I don't know anything about the ladies who are present here in court" (RT 6:20-25)

The prosecutor did not file a motion for exclusion, as he was permitted to do, but merely asked for an order orally, and made no written showing, other than to allow the court to review some reports that were neither marked nor made a part of the record to support the exclusion order.

The court's above quoted assertions regarding its explanation for its exclusion order did not qualify as findings under the applicable standard because they did not identify a demonstrable history or likelihood of threats on the part of those excluded, or that they had ever acted on the defendant's behalf in some illegal or violent manner, or had any knowledge of or connection to the conduct which the prosecutor claimed the incident reports alluded to.

Even assuming that in this case there had been some basis for excluding someone from the trial court

proceedings (which there was not), the exclusion order was not narrowly tailored to safeguard that interest.

Lesser restrictive alternatives to exclusion that were readily available included admonishment by the court of the three people present, under pain of contempt, to keep the information which would be revealed in the hearings confidential and not threaten the witnesses in any way.

Also, the court could have restricted the morning proceedings, when the witnesses were excluded, to the playing of the tape that formed the basis of the prosecutor's motion for the exclusion order, but it clearly did not even attempt to do so. In fact, at the end of the morning session, at the beginning of which the exclusion order was made, the tape had not been played at all and the trial court told the defense attorney to tell the family members that they would be all day and not to return until the next morning. The tape had not yet even been played by that time, and other matters which did not include the statement of the addresses of witnesses were discussed.

No administrative inconvenience that might have resulted from a less restrictive alternative to exclusion implicated any " 'higher values' than that of a criminal defendant's constitutional right to a public trial." Thus, the trial court's exclusion order was not justified under the test enunciated in *Press-Enterprise* and *Waller*.

The court singled out Petitioner's two female relatives and a female friend for exclusion without any particularized finding they would misuse the identifying information that would be revealed in the hearing; pose a realistic threat of violence to the witnesses; or engage in obstruction of justice or

witness tampering. It was observed by this Court in *Oliver, supra*, that "without exception all courts [in the United States] have held that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged." 333 U.S. at 271-272, 68 S.Ct. 499. The persons excluded in this case were two relatives to whom the allegations on which the exclusion motion was based did not apply, and a friend. who also was not implicated in that allegation.

Also, the exclusion order was of limited usefulness because the defendant and his counsel would be present during the hearing and learn the names. Separately, it should be noted that if the exclusion was based on the people's status as the defendant's family members, it was impermissible.

This Court has held that a defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee. "While the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance, the Framers plainly thought them nonetheless real. [Citations.] ..."The harmless error rule is no way to gauge the great, though intangible societal loss that flows' from closing courthouse doors." *Waller, supra,* 467 U.S. at p. 49 and fn. 9 [cited approvingly in *United States v. Gonzalez-Lopez*, 548 U.S. 140, n. 4 (2006).

The trial court violated Petitioner's right to a public trial by unjustifiably excluding three women, two of his relatives and a friend, from an entire day of the trial proceedings. As this was a structural error, which is not subject to harmless error analysis, reversal should have been automatic.

The opinion of the state Court of Appeal represents an erroneous analysis of the federal constitutional right to a public trial and the rules for evaluating a claimed denial of that right on appeal.

Petitioner respectfully submits that the recent trend in California jurisprudence relating to the Constitutional Right to a public trial is departing from the United States Supreme Court jurisprudence holding that any violation of the right is reversible per se, and the procedural safeguards imposed to ensure the right to an adequate appellate review of the closure of the courtroom in a criminal trial court proceeding are being overlooked on a slippery slope leading to a harmless error analysis of violations of the right which this Court has declared to be "structural error."

In *People v. Woodward*, 4 Cal.4th 376 (1992),[5] the California Supreme Court held that the Sixth Amendment right to a public trial creates a presumption of openness that can only be rebutted by a showing that exclusion of the public was necessary to protect some higher value. *Id.*, p. 383. The opinion of the Court of Appeal in this case, however, discussed the meaning of the term "higher value" by reference to lower federal and out of state court decisions including "protection of witnesses from threats, harassment, and/or physical harm. . .."[6] and noted that witness intimidation is a serious problem.

In *Woodward* the California Supreme Court went on to hold that the Sixth Amendment right to a public

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[5] Cited in the opinion in this case. See Opinion, Appendix, pp. 16, et seq.

[6] See Opinion, Appendix, 17.

courtroom was to be analyzed differently where, as here, a fraction of the public at large was excluded, citing as authority for that conclusion two intermediate federal appellate panel decisions.[7] This Court has never adopted a different analysis of a violation of the right to a public trial where less than the entire public has been excluded.

This Court has not endorsed even the *Woodward* decision, however, in the present case none of the procedural safeguards called for in *Woodward* were adhered to: there was no evidence offered to prove that exclusion was necessary for some higher value (i.e., "a showing that the exclusion of the public was necessary to protect some higher value."[8] (Underlining supplied.)), and there were no findings to that effect.

Nevertheless, because the California Supreme Court in *Woodward* confirmed that any violation of the right to a public trial requires reversal without regard to whether any prejudice is shown, *Id.*, 4 Cal.3d 383-384, the Court of Appeal in this case found no violation of that right.

In 2008, a panel of the same state Court of Appeal that decided the present case filed its published opinion in *People v. Esquibel*, 166 Cal.App.4th 539 (2008).[9]

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[7] Neither the Fourth Circuit, which decided *Snyder v. Coiner* 510 F.3d 224 (4th Cir. 1975), nor the Ninth Circuit in *United States v. Shirlock*, 865 F.2d 1069 (9th Cir. 1989), relied upon by the Court in *Woodward*, have addressed this issue *en banc*.

[8] See Opinion, Appendix, pp. 16-17, paraphrasing the *Woodward* holding at 4 Cal.4th p. 383.

[9] See e.g., ARB, pp. 3, 4, 5, 6, 7, 8, 9, and 10, and Respondent's Brief, pp. 24.

The court in *Esquibel* held that the partial closure of the courtroom, to exclude "select supporters" of the accused, does not create an automatic violation of the right to a public trial, in part because "the exclusion of spectators was for a minimal amount of time and because appellant's family supporters remained in the courtroom."[10]

Certiorari should also be granted to determine to what extent, if any, *Esquibel* is a correct statement of the law, or whether its reading runs afoul of the relevant Sixth Amendment jurisprudence, because in the present case even though the only "family supporters" present were not allowed to remain in the courtroom, the Court of Appeal still upheld the exclusion without any evidence in the record of any higher value, and without any allegations about the particular people excluded. Indeed, as noted, the trial court knew nothing about them when it ordered the three supporters of Petitioner out of the courtroom. There were no findings, written or otherwise, on this issue made by the trial court.

Moreover, *Esquibel* parsed the right to a public trial even further than the two tier analysis of the right endorsed in *Woodward* by distinguishing between "total closure" and "partial closure" and then holding that when only certain identified spectators are excluded there is an even less important "sub-category of the partial closure." 166 Cal.App.4th at 553.

Petitioner believes that the California decisions on the books prior to the decision in the instant case

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[10] This is language is emphasized by Petitioner, because in the present case all of Petitioner's supporters, including both of his family supporters, were removed.

reflect a march *away* from the basic principles in the decisions of this Court on the right to a public trial for both legal and practical reasons.

First, while cases like *Woodward* and *Esquibel* make a great deal out of the "partial" nature of closure, the idea that a partial closure risks less harm to the values protected by the right to a public trial is illusory because it is impossible to tell what a supporter of the defendant might see or hear that could be helpful to his defense in that part of the proceedings from which the supporters are excluded.

Second, although the Court of Appeal below apparently concluded that only specified spectators were excluded from Defendant's hearing and the public at large was not excluded, the record is totally unclear on that point -- it is impossible to tell whether anyone else was in the courtroom or sought admission to it during the hearing in which the two family members of Petitioner and one friend were excluded. The record does not establish that they were not the entire interested public, so the fact that the order did not *in terms* exclude the entire public, it very likely did exclude every member of the public present or interested in attending -- which from the standpoint of the Defendant's Sixth Amendment right is tantamount to total closure.

Finally, the terminology used by the panel in *Esquibel* such as "a minimal amount of time" or those used in the opinion below -- "too trivial to amount to a denial of Petitioner's right to a public trial"[11] appears to be nothing more than a surrogate for imposing harmless error analysis on a Constitutional error

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[11] Opinion, Appendix, pp. 18, 22.

which this Court has held not to be susceptible of prejudice analysis.[12] (Please see *Waller, supra,* 467 U.S. 39, 49, n. 9[13].

2.

Certiorari Should Be Granted Because California and Lower Federal Courts Have Erroneously Held That When a Closure of a Criminal Trial Is "Partial" or Excludes Only Part of the Public a Different Standard Applies to Determine Whether the Right to a Public Trial Has Been Violated.

Petitioner submits that the California trend in this area of the law has been a persistent erosion of the right to a public trial by means of parsing both the categories of closures, and by trivializing the probable prejudice from closures which are less than total.

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[12] Petitioner notes that during oral argument there appeared to be an undercurrent in the court's questions suggesting that there simply was no showing that Petitioner was harmed by the limited exclusion of two of his relatives and a friend. A copy of the oral argument recording is available and can be supplied on request. It supports the view that the idea that the error was not proven to be prejudicial may have inadvertently affected the Court of Appeal's conclusion that the exclusion of the only members of Petitioner's family who were present was not a violation of his right to a public trial.

[13] "While the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance, the Framers plainly thought them nonetheless real. [Citations.] ..."The harmless error rule is no way to gauge the great, though intangible societal loss that flows' from closing courthouse doors." *Waller, supra,* 467 U.S. at p. 49 and fn. 9 [cited approvingly in *United States v. Gonzalez-Lopez, supra,* 548 U.S. 140, n. 4.]

Neither of these trends is consistent with the decisions of this Court.

It appears that *because* courts are not constitutionally entitled to find that closure is harmless error, in order to achieve the same result courts have found ways to define such closures as non-violations of the right to a public trial.

However, even given the trend in the cases decided prior to this case, in California and in some lower federal and out of state courts, two immutable requirements found in both *Woodward* and *Esquibel* (both of which were analyzing the Sixth Amendment right as well as the state constitutional right to a public trial) have been the requirements of a "showing" that the closure was necessary to serve some higher value, and a very explicit record of findings.

In this case, however, the Court of Appeal has parted ways with both of those requirements because the opinion itself shows that: (1) the only "showing" the prosecutor proffered was his own oral announcement of his conclusions that someone [not the people being excluded] in Petitioner's family has threatened a witness; and (2) allowing the trial court to read, but not take into evidence, two police reports which prompted the trial judge to announce, after reading them, that the court had "no information" about the people being excluded.

Remarkably, despite the total absence, not only of specific written findings, but of any evidence whatsoever in the record to support the conclusion, the opinion below states that the "exclusion order in the present case was no broader than necessary." Opinion, Appendix, p. 20. This appellate "finding" is totally unreasonable and not supported by anything in the

record because the record shows nothing about the persons excluded.

In addition, the opinion allows unsupported assumptions about whatever was in police reports read by the trial judge, which are not a part of the record, to serve as a surrogate for any form of evidentiary or substantial "showing" of the facts which, when balanced against the defendant's right to have his family supporters in the courtroom, purportedly constitute evidence of a "higher value," trumping his Sixth Amendment right to a public trial.[14] Moreover, the opinion relies on rank speculation about what (without any evidence) the trial judge was "doubtless aware" of as further support for the order excluding the relatives.[15]

In fact, the opinion of the Court of Appeal supports the conclusion that *any time* there is an unsworn, unproven, uncorroborated *allegation* that "supporters" of the accused have threatened a witness, that allegation constitutes a "showing" that allows any other supporters of the defendant to be excluded from any part of the proceeding that might be relevant to the testimony of the allegedly threatened witness, because it is *possible* that any "supporters could

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[14] Opinion, Appendix, pp. 20-22. There the Court appears to have equated "representations of the prosecutor" and reports that "alleged that threats were made" by people *other than the ones excluded* as a substitute for any kind of substantial evidence or adequate "showing."

[15] The opinion continues, "the court did read the incident reports and was doubtless aware that supporters could communicate to others any information received in the courtroom. [footnote omitted]." Appendix, 21.

communicate to others any information received in the courtroom."[16]

There is simply no support in the case law from this Court for this sweeping conclusion, and certiorari should be granted to rein in the inferences the intermediate appellate courts are apparently willing to draw in this significant area of federal Constitutional law.

In addition, certiorari should be granted to explain what constitutes a "showing" sufficient to allow closure or partial closure to protect some "higher value" found in *Waller v. Georgia*, *supra*, 467 U.S. at p. 45, because clearly the California courts and several lower federal courts have relaxed that requirement to the point of non-existence.

For example, at least the Second, Fifth Eighth, Ninth, Tenth, and Eleventh Circuits have found that *Waller's* stringent standard does not apply to partial closures, and have adopted a less demanding test requiring the party seeking the partial closure to show only a "substantial reason" for the closure.[17] See also *United States v. Scott*, 564 F.3d 34, 38-39 (1st Cir. 2009) [finding no closure of the court even though the public could not enter or leave the courtroom during the jury charge. The court characterized the period as

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[16] Appendix, p. 21.

[17] *United States v. Farmer*, 32 F.3d 369 (8th Cir.1994); *Woods v. Kuhlmann*, 977 F.2d 74 (2d Cir.1992); *United States v. Sherlock*, 962 F.2d 1349 (9th Cir.1989), *cert. denied*,506 U.S. 958, 113 S.Ct. 419, 121 L.Ed.2d 342 (1992); *Nieto v. Sullivan*, 879 F.2d 743 (10th Cir.), *cert. denied*,493 U.S. 957, 110 S.Ct. 373, 107 L.Ed.2d 359 (1989); *Douglas v. Wainwright*, 739 F.2d 531 (11th Cir.1984), *cert. denied*,469 U.S. 1208, 105 S.Ct. 1170, 84 L.Ed.2d 321 (1985).

"quite brief" and cautioned that such a procedure should be used only "carefully and sparingly."]; *Sevencan v. Herbert*, 316 F.3d 76, 88 (2d Cir. 2002) [upholding exclusion of a family member based on an "implied finding" where the implication was necessary to support the *Waller* finding requirements.[18]

The present case is somewhat analogous to *Sevencan* because the proffered justification or "higher value" was witness safety. However, there the prosecution presented detailed evidence demonstrating how allowing the defendant's wife to remain in the courtroom could pose an actual threat to the witness (an undercover officer), unlike the present case where there was no evidence offered, and no findings. Nor was there any consideration of any alternative means of serving the alleged higher values relied upon in the present case.

This Court's guidance is needed to prevent the subtle shift from *Waller's* "overriding interest" test to the lower federal court's "substantial reason" test, to the virtually non-existent test utilized in California, and in particular, in the present case, becoming the standard by which the important Sixth Amendment right to a public trial is reduced from a meaningful right of the accused to a mere form of words, offering no protection, and offering no remedy for its violation.

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[18] The dissent in that case points out that the closure should have been upheld without this sweeping language, and the record in that case demonstrates the difference between an actual showing and findings and what took place in the present case -- assumptions, no evidence and no findings.

Conclusion

For all these reasons, this Court is urged to grant the writ and reverse the judgment of the state Court of Appeal affirming Petitioner's conviction.

WHEREFORE, Petitioner prays that this Honorable Court grant his Petition and issue its Writ of Certiorari.

Respectfully submitted this 17th day of February, 2010.

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